United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL 75-7069

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket Nos. 75-7069, 75-7208

COMPANIA ESPANOLA DE PETROLEOS, S.A.,
Plaintiff-Appellant-Cross-Appellee,

against

NEREUS SHIPPING, S.A.,
Defendant-Appellee-Cross-Appellant.

Docket No. 75-7206

HIDROCARBUROS y DERIVADOS, C.A.,
Plaintiff-Appellee,

against

NEREUS SHIPPING, S.A.,
Defendant-Appellee,

and

COMPANIA ESPANOLA DE PETROLEOS, S.A.,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT,
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF NEREUS SHIPPING, S.A., AS APPELLANT

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UNITED STATES COURT OF APPEALS
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(See inside of cover for completion of caption.)

Docket No. 75-7207

In the Matter of the Arbitration

between

HIDROCARBUROS y DERIVADOS, C.A.,

Petitioner-Appellee,

against

NEREUS SHIPPING, S.A.,

Respondent-Appellant.

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BRIEF OF NEREUS SHIPPING, S.A., AS APPELLANT

This matter involves four appeals, from two actions and one petition under the Federal Arbitration Act, 9 USC § 5, for the appointment of a third arbitrator in the arbitration between Nereus Shipping, S.A. (hereinafter referred to as "Nereus") and Hidrocarburos y Derivados, C.A. (hereinafter referred to as "Hideca").

The three appeals in which Nereus is appellant are from the order of the United States District Court for the Southern District of New York dated March 21, 1975 upon the decision of the Honorable Charles E. Stewart (A-218 to A-222).* Judge Stewart's decision was entered in an action by Hideca for an injunction, 75 Civil 463, and in a proceeding by Hideca for the appointment of a third arbitrator in the Nereus-Hideca Arbitration, 75 Civil 464. By order of the Court, the same decision was filed in the prior action by Compania Espanola De Petroleos, S.A. (hereafter referred to as "Cepsa") against Nereus, 74 Civil 5102, with the result that it erroneously modified the prior decision of the Court dated December 18, 1974 while there was an appeal to this Court pending in that action (A-99-A107).

Statement

Nereus as Owner and Hideca as Charterer entered into a maritime contract of affreightment dated January 27, 1971 (A-48 to A-54) for the transportation in vessels furnished by Nereus of 600,000 long tons of oil cargoes each year, 10% more or less at the option of Nereus, for a period of three (3) years (hereinafter referred to as the "Contract"). The Contract provided in Part II, clause 24 for arbitration of disputes between Nereus and Hideca in New York before a panel of three (3) arbitrators (A-54).

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* References to page numbers with the prefix "A" are to pages of the Joint Appendix.

The cargoes which Hideca was to furnish under the Contract were crude oil cargoes consigned to Cepsa, and Nereus and Cepsa entered into Addendum No. 2 to the Contract, which was signed at the time the Contract was executed and delivered (hereinafter referred to as "Addendum No. 2").

The terms of Addendum No. 2 signed by Cepsa incorporated the arbitration clause of the Contract* and provided as follows (A-49):

> "In connection with the contract of affreightment, embodied in the Charter Party drawn up at New York and dated 27th January, 1971, between Nereus Shipping S.A. as Agents for Owners (hereinafter called the Owner), and Hidrocarburos y Derivados, C.A. (HIDECA) (hereinafter called the Charterer), being that the Charterer shall use the tonnage contracted under the present Charter Party for the transportation, during the period of three years commencing November 1971/January 1972, of crude oil under a CIF contract to be signed with Compania Espanola de Petroleos, S.A. (CEPSA) we, Compania Espanola de Petroleos, S.A., hereby agree that, should HIDECA default in payment or performance of its obligations under the Charter Party, we will perform the balance of the contract and assume the rights and obligations of HIDECA on the same terms and conditions as contained in the Charter Party. Provided, however, that Compania Espanola de Petroleos, S.A., shall not be responsible for any payments or damages as a result of HIDECA's default, prior to receiving written notice from the Owner advising us that HIDECA is in default, and calling upon us to assume performance of the Charter Party."

Performance of the Contract commenced on December 24, 1971 at the freight rate provided in the Contract which

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* The arbitration clause is set forth at pages 21 and 22 herein.

was Worldscale* 130 per ton. So long as the market rate equalled or exceeded the Contract freight rate Hideca furnished cargoes under the Contract. However, after the Arab oil embargo in October, 1973, the market rate for oil cargoes fell precipitously to approximately Worldscale 40 (A-45 at paragraph 25 and A-69 at paragraph 7). Thereafter, for voyages No. 13 through No. 16, Hideca failed to pay war risk insurance premiums and demurrage as required by the Contract in the amount of $301,058.29 (A-69 and A-166 to A-170).

In addition, Hideca failed to pay the entire freight in the amount of $770,424.17 for cargo delivered on July 12, 1973 on voyage No. 17, as well as demurrage of $61,432.29 (A-59 to 60 and A-69). Following Hideca's failure to pay freight, on July 24, 1973 Nereus invoked the provisions of Addendum No. 2. Hideca admittedly had failed to pay freight of $770,424.17 as well as demurrage and extra insurance premiums required to be paid under the Contract in the total amount of $1,236,845.67. In addition, Hideca had refused to accept the nomination by Defendant of the tanker vessel TROPIC to perform the eighteenth voyage under the Charter (A-37). As a result, pursuant to Addendum No. 2 quoted above, Nereus on July 24, 1974 sent a telex to Cepsa (A-36 and A-55) stating, in part, as follows:

> "Owner refers to letter of guarantee in his favor given by Cepsa made and dated 24 June 1971 at Madrid by the terms of which Cepsa agreed that should Hideca default for payment or performance of its obligations under the contract of affreightment dated 27 January 1971 (Charter Party) Cepsa, upon notice from Owner, would perform the balance of the Charter Party and assume the rights and obligations of Hideca on the same terms and conditions as contained

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* "Worldscale" is the code word for the Worldwide Tanker Nominal Freight Scale which establishes in dollars the freight per ton of cargo carried.

> in the Charter Party. Owner hereby gives Cepsa notice under said letter of guarantee that Hideca is in default under the Charter Party and calls upon Cepsa to perform the balance of the Charter Party."

Since Addendum No. 2 specifically provided that Cepsa would "not be responsible for any payments or damages as a result of Hideca's default, prior to receiving written notice * * * that Hideca is in default and calling upon (CEPSA) to assume performance of the (Contract)", it was necessary for Nereus to proceed against Hideca to recover the $1,236,845.67 which had not been paid by Hideca as required by the Contract. On July 26, 1974, Nereus obtained an order of attachment in the District Court but no assets of Hideca were located and attached (A-36 to A-38 and A-56 to A-66). Nereus also sought unsuccessfully to execute a lien as provided in clause 21 of the Contract for the unpaid freight for voyage No. 17 (A-170).

On August 14, 1974, Nereus demanded arbitration with Hideca to recover the sums due and unpaid by Hideca under the Contract (A-135 and A-144 to A-145). Meanwhile, Nereus called upon Cepsa to perform the balance of the Contract, which called for shipment of a further 450,249 tons of cargo, as required by Addendum No. 2.

On August 6, 1974, Cepsa rejected the nomination of to perform voyage No. 18 (A-38, A-70 and A-136).

On August 2, 1974 Nereus nominated to Cepsa a vessel for voyage No. 18 and replied, in part, as follows (A-38, A-71 and A-136):

> "Since it is far from clear to us that you have properly invoked the guarantee before we respond to the aforesaid nomination we must receive from you adequate assurance that you will hold us harmless from any damages or losses we may incur as a result of accepting that nomination in the event that you have im-

> properly invoked the guarantee and we are not obliged to perform Hideca's obligations under the said contract of affreightment. Please advise us as to what guarantee you will provide protecting us against such damages and losses."

Although not required to do so, Nereus agreed to furnish a guarantee of the First National City Bank in Madrid, Spain to Cepsa with respect to the foregoing request by Cepsa (A-137). However, Cepsa first agreed to perform the balance of the Contract as required by Addendum No. 2, and then refused to do so (A-39 to 41 and A-72 to 73).

On August 30, 1974, Cepsa stated by telex to Nereus' attorneys, in part, as follows (A-40 to A-41).

> "We have been advised by Hideca that they are not in default and therefore Nereus has no right to demand performance of the COA from us. In view of your dispute with Hideca you must first obtain a judgment in your favor before seeking to enforce guaranty."

Although loosely referred to as a guaranty, Addendum No. 2 was in the nature of a novation under which Cepsa agreed to itself perform the balance of the Contract but did not guarantee payment of Hideca's obligations.

Nereus then served a demand for arbitration upon Cepsa as provided in the arbitration clause of the Contract incorporated in Addendum No. 2. Following Cepsa's refusal to nominate an arbitrator, the Arbitration panel for the Nereus-Cepsa Arbitration was completed in accordance with the express terms of the arbitration clause and an arbitration hearing was scheduled for November 21, 1974, upon notice to Cepsa's attorneys (A-41 to A-42).

On that date the situation was that two separate arbitrations were pending. In the Nereus-Hideca Arbitration, Nereus was seeking to recover $1,236,845.67 for freight, demurrage and insurance premiums not paid by Hideca prior to July 24, 1974, when Nereus invoked Addendum No.

2. These sums could not be recovered against Cepsa by reason of the express terms of Addendum No. 2 which provided that Cepsa was not the guarantor of the obligations of Hideca. In the Nereus-Cepsa Arbitration, Nereus was seeking damages caused by Cepsa's refusal to perform the balance of the Contract as required by Addendum No. 2, after receipt of Nereus' notice of July 24, 1974.

On the date the first arbitration hearing was scheduled to commence in the Nereus-Cepsa Arbitration before a panel of three (3) Arbitrators appointed in accordance with the express provisions of the arbitration clause, Cepsa moved by order to show cause to stay the hearings until completion of the Nereus-Hideca Arbitration (A-2 to A-16). The attorneys for Hideca attended in Court in support of Cepsa's motion for a preliminary injunction and submitted an affidavit in support thereof (A-95-A-98).

After the District Court by the decision of Judge Stewart dated December 18, 1974 (A-99-A-107) refused to grant the injunction sought by Cepsa and supported by Hideca, and after Cepsa filed its notice of appeal (A-108), Hideca filed a complaint in admiralty for the same injunctive relief which the Court had previously denied (A-112 to A-118). Hideca also filed a petition for the appointment of a third arbitrator in the Nereus-Hideca Arbitration (A-226 to A-233).

Addendum No. 2 provided for performance of the balance of the Contract by Cepsa "should Hideca default in the payment or performance of its obligations under the (Contract)" upon written notice to Cepsa advising "that Hideca [was] in default." The failure of Hideca to pay freight for voyage No. 17 as well as demurrage on voyages Nos. 14 through 17, and insurance premiums has never been denied.

By the decision of Judge Stewart dated March 21, 1975, the District Court in the Hideca action i) effectively removed the three (3) arbitrators appointed as the panel in the Nereus-Cepsa Arbitration; ii) directed the Nereus-Cepsa Arbitration and the Nereus-Hideca Arbitration to be

consolidated before a panel of five (5) Arbitrators; and iii) directed that the panel be selected in a manner totally different from that provided in the arbitration clause of the Contract between Nereus and Hideca and Addendum No. 2 between Nereus and Cepsa.

The Issues on Appeal

The basic issues raised by the appeals of Nereus are as follows:

1. Did the filing of a notice of appeal by Cepsa and the taking of jurisdiction over the appeal by this Court deprive the District Court of jurisdiction to modify the decision dated December 18, 1974 in the Cepsa v. Nereus action, 75 Civil 5102 by the District Court's decision dated March 21, 1975 in the Hideca v. Nereus action, 75 Civil 463?

2. Should the District Court have dismissed Hideca's action for an injunction, 75 Civil 463, for failure to state a cause of action in admiralty?

3. Did the District Court have power under the Federal Arbitration Act, 9 USC § 1 *et seq.* to remove the three (3) arbitrators in the Nereus-Cepsa Arbitration, who had been properly appointed pursuant to the arbitration agreement between the parties?

4. Where the arbitration agreements between Nereus and Cepsa and between Nereus and Hideca provided for arbitration before a panel of three (3) Arbitrators, may the Court order arbitration before a panel of five (5) Arbitrators?

5. May the Court order arbitrators to be selected in a manner different from the procedure specified in the arbitration agreement signed by the parties?

6. Does the Federal Arbitration Act, 9 USC § 4, limit the Court's power to direct parties to proceed to arbitra-

tion, whether by consolidation or otherwise, to "an order directing that such arbitration proceed in the manner provided for in such agreement" as the parties have made for arbitration?

POINT I

(Appeal No. 75-7208)

The District Court lacked jurisdiction to modify its decision dated December 18, 1974 during the pendency of an appeal to this Court concerning the Nereus-Cepsa Arbitration.

By the decision of Judge Stewart dated December 18, 1974 (A-99 to A-107), the District Court held that Cepsa was obliged to arbitrate with Nereus the issue of its refusal to perform the balance of the Contract as provided in Addendum No. 2. The Court also denied Cepsa's motion for an injunction requiring the Nereus-Cepsa Arbitration to be delayed until after completion of the Nereus-Hideca Arbitration.[1]

At the time that Cepsa commenced its action to enjoin the arbitrators from proceeding with the Nereus-Cepsa Arbitration, the arbitration hearings were duly scheduled to commence before a properly appointed panel of arbitrators ("Nereus-Cepsa Arbitration Panel"). The District Court in refusing to enjoin the Nereus-Cepsa Arbitration held, in part, as follows (A-101):

> "After Nereus named an initial arbitrator and Cepsa failed to name its own arbitrator, Nereus named a second arbitrator pursuant to the above clause. Those two arbitrators then appointed a third arbitrator in accordance with the arbitration clause of the contract.

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[1] Hideca through its attorneys appeared in that action, 74 Civil 5102, and submitted an affidavit in support of the relief sought by Cepsa (pages A-95 to A-98).

> The arbitration proceedings were scheduled to begin November 21, 1974. On that date, plaintiff Cepsa filed this action and successfully sought a temporary restraining order from this court enjoining the commencement of the scheduled arbitration proceedings.
>
> Plaintiff now seeks an injunction to enjoin the defendant and the arbitrators from commencing the arbitration proceedings."

As a result of the decision of Judge Stewart dated December 18, 1974, Cepsa was obligated to arbitrate with Nereus before the Nereus-Cepsa Arbitration Panel the disputes concerning Cepsa's refusal to perform the balance of the Contract as required by Addendum No. 2 thereto. Moreover, the District Court refused to order that the Nereus-Cepsa Arbitration be delayed until after the Nereus-Hideca Arbitration was held and completed, and neither Cepsa nor Hideca moved for reargument with respect to the District Court's decision dated December 18, 1974.

On January 17, 1975, Cepsa filed a Notice of Appeal to this Court (A-109) and on January 28, 1975, Nereus filed a Notice of Motion in this Court to dismiss Cepsa's Appeal. By its decision dated February 11, 1975, this Court retained the appeal and directed the parties to brief the question of jurisdiction and whether the decision and order were appealable together with the other issues raised by Cepsa as appellant.

As a result of the appeal pending in this Court, the District Court did not have jurisdiction on March 21, 1975 to modify its December 18, 1974 decision so as to i) effectively remove the Nereus-Cepsa Arbitration Panel and ii) direct Nereus to arbitrate before a panel of five (5) instead of three (3) arbitrators, as provided in the arbitration clause of the Contract incorporated in Addendum No. 2, which was signed by Nereus and Cepsa.

In *Weiss* v. *Hunna,* 312 F 2d 711, 713 (2d Cir. 1963), cert. denied 374 U.S. 853 (1963) this Court held, in part, as follows:

> "Plaintiff, a citizen and resident of New York, acting *pro se,* appeals from a judgment of the District Court for the Southern District of New York entered March 16, 1962, on an opinion by Judge Bonsal . . . Plaintiff appeals also from an order dated August 6, 1962, in which Judge Bonsal, in a memorandum, denied his motion to set the judgment aside on the ground that, under 28 U.S.C. § 455, the judge should have disqualified himself from trying the case.
>
> Review of the August 6 order encounters an obstacle of which we must take note although neither party has raised it here. Plaintiff's motion to vacate the judgment on the ground of disqualification was made on July 23, 1962, more than four months after the judgment had been entered and over three months after the plaintiff, on April 10, had filed a notice of appeal. . . . *But once plaintiff had filed a notice of appeal, the district court was divested of jurisdiction to grant or deny relief* under either Rule 59 or Rule 60(b) except with our permission. (citing cases) We therefore cannot recognize the August 6 order as validly entered and appealed from; . . ." (Italics added)

In *United States* v. *Radice,* 40 F 2d 445, 446 (2d Cir. 1930), this Court held as follows:

> "The perfecting of that appeal transferred all jurisdiction of the cause to this court, and thereafter, during pendency of that appeal, the court below was without power to vacate or modify its decree of forfeiture. *Midland Term, Ry. Co.* v. *Warinner,* 294 F. 185 (C. C. A. 8); *First Nat. Bank* v. *State Nat. Bank,* 131 F. 430 (C. C. A. 9); *Citizens' Bank* v. *Farwell,* 56 F. 539 (C. C. A. 8); *Bronson* v. *La Crosse & M. R. Co.,*

1 Wall. 405, 17 L. Ed. 616; *Draper* v. *Davis,* 102 U. S. 270, 26 L. Ed. 121; *Keyser* v. *Farr,* 105 U.S. 265, 26 L. Ed. 1025; *Hovey* v. *McDonald,* 109 U.S. 150, 157, 3 S. Ct. 136, 27 L. Ed. 888. It is true that on September 5th, and before the expiration of the term at which the decree of forfeiture was entered, the District Court had ordered the lessor and the lessee to show cause in response to the present appellant's motion to vacate the decree and to be allowed to intervene, and that said motion was thereafter taken under consideration by the court (one of the opposing affidavits having been verified as late as October 24th) and a decision rendered on the merits. But such proceedings could not preserve jurisdiction to the District Court. . . . *The removal of the case into this court under the prior appeal left the District Court without power to enter the order applied for, and the motion should have been dismissed for lack of jurisdiction.*" (Italics added)

It is clear from the decisions of this Court, that even if Cepsa and Hideca had affirmatively moved in the Cepsa v. Nereus action (74 Civil 5102, Appeal No. 75-7069) to i) enjoin the arbitration hearings, or ii) remove the Nereus-Cepsa Arbitration Panel, or iii) consolidate before a panel of five (5) arbitrators the Nereus-Cepsa Arbitration with the Nereus-Hideca Arbitration, the District Court would have lacked jurisdiction to entertain such motions.

Instead, the District Court erroneously sought to accomplish these results in a separate, later proceeding, Hideca v. Nereus and Cepsa, 75 Civil 463, Appeal No. 75-7206. The District Court erroneously provided in its order dated March 20, 1975 (pp. A-218 to A-222), as follows:

> "The facts surrounding these cases are set forth in our memorandum of December 18, 1974, in the related case of *Compania Espanola de Petroleos, S.A.* v.

Nereus Shipping, S.A., 74 Civ. 5102. The clerk is directed to file a copy of the instant memorandum and order with the file in that case.

* * *

ORDERED, that the two said arbitrations are hereby consolidated for all purposes and all claims of the three parties shall be heard in said consolidated arbitration before one panel of arbitrators; and it is further

ORDERED, that the arbitration panel who shall hear all claims shall consist of five members one of whom shall be chosen by plaintiff Hideca, one chosen by defendant Nereus, one chosen by defendant Cepsa, and those three chosen shall choose the remaining two arbitrators, and it is further

ORDERED, that a copy of this order be served upon the arbitrators appointed in the arbitration previously pending between plaintiff and defendant Nereus, and those appointed in the arbitration previously pending between defendants Nereus and Cepsa."

Based on the decisions of this Court quoted above, the District Court lacked jurisdiction to modify its decision in the Cepsa v. Nereus action (74 Civil 5101) after the appeal in that action was pending in this Court (75 Appeal No. 7069).[2] Accordingly the order dated March 21, 1975 is invalid insofar as it purports to modify the decision of the District Court dated December 18, 1974.

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[2] District Court cases holding that the Court lacked jurisdiction to modify a decision or order from which an appeal had been taken include *Rolle* v. *New York City Housing Authority*, 294 F. Supp. 574 (S.D.N.Y., 1969); *Ritter* v. *Hilo Varnish Corp.*, 186 F. Supp. 625 (S.D.N.Y. 1960); *Freedman* v. *Overseas Scientific Corp.*, 150 F. Supp. 394 (S.D.N.Y. 1957), aff'd 248, F2d 274 (2d Cir. 1957), and *Daniels* v. *Goldberg*, 8 FRD 580 (S.D.N.Y. 1948), aff'd 173 F2d 911 (2d Cir. 1949).

POINT II

(Appeal Nos. 75-7069 and 75-7206)

The District Court correctly refused to issue an injunction with respect to the Nereus Cepsa Arbitration and should have dismissed the Hideca complaint.

The District Court correctly refused to issue an injunction in favor of Cepsa in its action against Nereus (74 Civil 5102, Appeal No. 75-7069) to restrain the holding of arbitration hearings by the Nereus-Cepsa Arbitration Panel.

The only relief sought by Hideca in its subsequent action[3] was an injunction restraining arbitration between Nereus and Cepsa. Hideca's complaint (page A-114) demanded the following relief:

> "1. That the Court issue an injunction preventing and restraining the defendants (i.e., Nereus and Cepsa), their officers, agents, servants, employees, attorneys, and the panel of arbitrators chosen by them from proceeding with and participating in the arbitration between the defendants arising from the contract of affreightment dated January 27, 1971 between plaintiff and defendant Nereus, pending the outcome of the arbitration between plaintiff and defendant Nereus arising from the same Contract of Affreghtment."

Although courts in admiralty may stay an admiralty action pending arbitration (9 U.S.C. § 3), they do not issue

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[3] Following the District Court's decision dated December 18, 1974, Hideca, which had participated in the Cepsa-Nereus action, commenced a separate action against Nereus and Cepsa for the same relief denied by the Court in its decision therein. Hideca sought to enjoin the hearings before the Nereus-Cepsa Arbitration Panel.

injunctions, except in proceedings for limitation of liability as provided in the Limitation Act, 46 U.S.C. § 183. In *Schoenamsgruber* v. *Hamburg American Line*, 294 U.S. 454, 457, 79 L. Ed. 989 (1935), the Supreme Court held, in part, as follows:

> "While courts of admiralty have capacity to apply equitable principles in order the better to attain justice, they do not have general equitable jurisdiction and, except in limitation of liability proceedings, they do not issue injunctions."

In *Moran Towing & Transportation Co.* v. *United States*, 290 F 2d 660, 662 (2d Cir. 1961), this Court held, in part, as follows:

> "The power of admiralty to issue injunctions appears to be circumscribed; some authorities deny any power except in limitation proceedings * * *."

Hideca did not cite any authority to maintain an action in admiralty to obtain an injunction preventing arbitration of disputes between two other parties (i.e., Nereus and Cepsa) to a maritime contract. Based on the authorities quoted above, Hideca's complaint in 75 Civil 463, 75 Appeal No. 7206 should have been dismissed for failure to state a cause of action.

The District Court after correctly denying Cepsa's motion for an injunction and correctly holding in its December 18, 1974 decision that Cepsa was obligated to arbitrate before the Nereus-Cepsa Arbitration Panel, erroneously failed to dismiss Hideca's action. The complaint filed by Hideca (A-112 to A-114), which sought the same relief the Court had previously and correctly denied at the request of Cepsa and Hideca, should have been dismissed based on the foregoing decisions of this Court and the Supreme Court.

POINT III

(Appeal No. 75-7069)

The District Court correctly held that Addendum No. 2 required Cepsa to arbitrate with Nereus the question of Cepsa's refusal to perform.

The District Court correctly held in its decision dated December 18, 1974 as follows:

> "What is before us is the issue of whether plaintiff Cepsa is obligated to arbitrate disputes arising from a Letter of Guaranty—Addendum 2 to the contract—signed by plaintiff Cepsa as a guarantor of Hideca. Under the guaranty, Cepsa agreed that 'should Hideca default in payment or performance of its obligations under the Charter Party [contract of affreightment], we will perform the balance of the contract and assume the rights and obligations of Hideca on the same terms and conditions as contained in the Charter Party.
>
> * * *
>
> For the reasons stated below, we deny plaintiff's request for declaratory and injunctive relief.
>
> I. Incorporation of the Letter of Guaranty.
>
> Plaintiff argues that its signing of the Letter of Guaranty did not obligate it to enter into arbitration with Nereus. It contends that while it agreed to perform the balance of the contract of affreightment under certain conditions, arbitration is not 'performance,' and hence it is not bound to arbitrate. We find it unnecessary to construe the meaning of the word 'performance' in the contract, since by the addendum Cepsa agreed not only to perform the balance of the contract, but to 'assume the rights and obligations of HIDECA on the same terms and conditions as contained in the Charter Party [contract of affreightment].'

This language is clear and unequivocal, and, we believe, compels a finding that the Letter of Guaranty does incorporate the contract's arbitration clause. We do not believe that the proviso in the Letter of Guaranty requiring Nereus to notify Cepsa of any default by Hideca causes us to modify this finding. That proviso obligated Nereus to advise Cepsa of Hideca's default, and to call upon Cepsa to 'assume performance of the Charter Party.' Even though this language does not reiterate that Cepsa was to assume the rights and obligations of HIDECA following alleged non-performance, we do not believe such language was necessary.

* * *

Thus we conclude that the Letter of Guaranty does incorporate the arbitration clause in the contract of affreightment. It thus follows that Cepsa has consented to arbitrate disputes once it has been notified by Nereus of any default by Hideca.

II. Prematurity of Arbitration.

Cepsa argues that even if it is bound to arbitrate with Nereus, it cannot do so until it has been conclusively determined that Hideca has defaulted. It maintains that this conclusion follows from the proviso in the Letter of Guaranty that it shall only be liable for payments or damages as a result of Hideca's default after receiving written notice that Hideca is in default. We disagree. We are in accord with the judge in *Midland Tar* that any ambiguities in the letter of guaranty must be construed 'in accordance with the rules generally applied to commercial contracts, in order to glean the intent of the parties from the words they used and the actions they performed in their conduct of the transaction.' *Midland Tar Distillers, Inc.* v. *M. T. Lotos,* 362 F. Supp. 1311 (S.D.N.Y. 1973). In so holding, we do not find Cepsa's inter-

pretation commercially reasonable. If plaintiff's interpretation were correct, Cepsa would never be bound to perform any of the obligations of Hideca until it were first conclusively determined, presumably by arbitration, that Hideca was in default, and until judicial appeals were exhausted. If this procedure were followed, plaintiff's guaranty would be limited effectively to paying damages at some point in the future to the defendant, unless Cepsa were willing to concede that Hideca was in fact in default. We thus conclude that Cepsa's obligations under the Letter of Guaranty came into play as soon as it received the notification from Nereus that Hideca was in default."

The Arbitration Clause of the Contract provided that "Any and all differences and disputes of whatsoever nature arising out of this Charter shall be put to arbitration in the City of New York * * *". In *Midland Tar Distillers, Inc.* v. *M.T. Lotos,* 362 F. Supp. 1311 (S.D.N.Y. 1973), 1973 A.M.C. 1924, the Court held that a cargo claimant was required to arbitrate a cargo claim under a bill of lading which incorporated a charter party containing an arbitration clause stating, in part, "any dispute arising in any way whatsoever out of this Charter Party shall be settled in London, Owners and charterers each appointing an Arbitrator * * *".

In holding that the consignee (which unlike Cepsa had not signed a document similar to Addendum No. 2 binding it to perform the terms and conditions of the Contract) was required to arbitrate, the Court stated the law, in part, as follows:

> "It is well settled that arbitration is a creature of contract and that one cannot be compelled to arbitrate unless he has agreed to do so. Such an agreement need not be embodied in any single writing or document, but rather as the Court of Appeals for this cir-

cuit has made clear, a charter party and a bill of lading may be read together to form the complete contract of carriage between the parties. *Son Shipping Co. v. DeFosse & Tanghe,* 1952 A.M.C. 1931, 1933, 199 F. (2d) 687, 688 (2 Cir., 1952)."

* * *

"The court is obligated to construe the ambiguities of the instant clause in accordance with the rules generally applied to commercial contracts, in order to glean the intent of the parties from the words they used and the actions they performed in their conduct of the transaction. The arbitration provision, by its terms, plainly manifests the intent of the parties to the charter party to arbitrate all disputes arising thereunder. This intent to arbitrate all disputes was carried forward into the bill of lading by the parties thereto by means of the unrestricted incorporation provision contained in the bill. The parties' use of the words 'all the terms, liberties and conditions' allows the court no inference of any contrary intent. The plaintiff became obligated to arbitrate any dispute involving this shipment at the moment it became holder of the bill, plaintiff then having sufficient notice of the incorporated terms.

The incorporation of the arbitration clause by the bill of lading, and thereby by the plaintiff's contract of carriage, expands the scope of that clause to embrace persons other than the two parties extant at the time of its drafting. The court finds implicit in this expanded usage a concomitant expansion in the provision for the selection of arbitrators. The arbitration provision, viewed in light of the totality of the present circumstances, especially the intended incorporation of it as a term of the bill, should be read so as to afford each party to an arbitrable controversy the right to select an arbitrator. The intent of

> the parties tc arbitrate all controversies could not otherwise be effectuated without creating hardship and working an injustice."

Under the Contract, Nereus and Hideca must arbitrate all claims arising before Nereus invoked its rights under Addendum No. 2 of the Contract. Addendum No. 2 states that Cepsa "shall not be responsible for any payments or damages as a result of Hideca's default, prior to receiving written notice * * * and calling upon [Cepsa] to assume performance of the Charter Party."

However, for all disputes concerning Cepsa's refusal to perform the balance of the Contract after July 24, 1974, when Nereus invoked its rights under Addendum No. 2, the arbitration clause was binding upon Cepsa in the same way that the arbitration provision in the *Lotos* case was binding upon the consignee. Moreover, since Cepsa signed Addendum No. 2 to the Contract, Cepsa's obligation to arbitrate is much clearer than that of the consignee in the *Lotos* case.

In *Import Export Steel Corp.* v. *Mississippi Valley Barge Line Co.*, 245 F. Supp. 249, 251 (S.D.N.Y. 1965), 1965 A.M.C. 1035, aff'd 351 F 2d 503 (2d Cir. 1965), the Court held, in part, as follows:

> "The court has examined the arguments of and cases cited by counsel, and is of the opinion that an order directing arbitration is warranted by dint of the memorandum of agreement dated December 13, 1963[4] and the incorporation provision in the through bills of

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[4] The Court quoted the Memorandum which provided in part, as follows:

> "The Mississippi Valley Barge Line Company will assume all the obligations and privileges of Bulk Carriers, Ltd. under the above Charter Party and the Addendum thereto. In exchange, Bulk Carriers, Ltd., as agents for the Mississippi Valley Barge Line Company, will issue a thorough bill of lading covering the carriage by sea, transshipment and onward carriage by barge."

> lading, as is affirmatively indicated by the Court of Appeals of this Circuit in *Son Shipping Co.* v. *De Fosse & Tanghe,* 199 F. (2d) 687 (2 Cir., 1952) . . ."

By signing Addendum No. 2 to the Contract, Cepsa agreed to "assu[me] the rights and obligations of Hideca on the same terms and conditions as contained in the Charter Party." As a result, Cepsa is in the same position as the Mississippi Valley Barge Line under its Memorandum, by the terms of which it "assume[d] all the obligations and privileges of Bulk Carriers Ltd. under that charter party." Therefore, Cepsa was obligated to arbitrate for the same reasons that Mississippi Valley Barge Line was held to be obligated to arbitrate. In affirming that decision, this Court held, in part, as follows (351 F 2d 503, 506, 1966 A.M.C. 237):

> "Furthermore, the addendum's arbitration clause made arbitrable all disputes that might arise between the disponent owners and the charterers. Nimpex, of course, qualifies as a charterer, and Mississippi by express agreement assumed all the obligations and privileges of Bulk, a disponent owner."

The District Court correctly held in its decision dated December 18, 1974 that Cepsa was obligated by the terms of Addendum No. 2 to arbitrate with Nereus before the Nereus-Cepsa Arbitration Panel the dispute concerning Cepsa's refusal to perform the balance of the Contract.

POINT IV

Instead of enforcing the contractual arbitration agreement of the parties, the District Court erroneously ordered arbitration before a five man panel selected in a manner contrary to the contract.

The courts have consistently held that arbitration is a creature of contract between the parties, who have agreed to a specific method of resolving their disputes, and that

the role of the courts is simply to enforce the arbitration agreement made by the parties. In *Scherk* v. *Alberto—Culver Co.*, —— U.S. ——, 94 S. Ct. 2449, 41 L. Ed. 270, 276, 280 (1974) the Court held, in part, as follows:

> "The Arbitration Act of 1925, 9 USC §§ 1 et seq. [9 USCS §§ 1 et seq.], reversing centuries of judicial hostility to arbitration agreements, was designed to allow parties to avoid 'the costliness and delays of litigation, and to place arbitration agreements 'upon the same footing as other contracts. . . .'" HR Rep No. 96, 68th Cong, 1st Sess, 1 (1924); see also S Rep No. 556, 68th Cong, 1st Sess (1924). Accordingly, the Act provides that an arbitration agreement such as is here involved 'shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.'" 9 USC § 2 [9 USCS § 2].
>
> • • •
>
> An agreement to arbitrate before a specified tribunal is, in effect, a specialized kind of forum-selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute."

The arbitration clause agreed to by Nereus and Hideca in the Contract and by Nereus and Cepsa by reason of Addendum No. 2 provided for arbitration before three (3) arbitrators, not five (5) arbitrators as ordered by the District Court in its March 20, 1975 decision (pages A-218 to A-22). Moreover, the arbitration clause provided for a specific method of selection of the arbitrators,[5] which has been erroneously disregarded by the District Court.

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[5] The arbitration agreement, clause 24 of the Contract, provides, in part, as follows:

> 24. ARBITRATION. Any and all differences and disputes of whatsoever nature arising out of this Charter shall be put to

(*footnote continued on following page*)

In *Hutchings* v. *United States Industries, Inc.*, 428 F 2d 303, 312 (5th Cir. 1970), the Court stated: "The arbitration process is a private one essentially tailored to the needs of the contracting parties, who have agreed upon this method for the final adjustment of disputes under their contract." In *Ocean Industries, Inc.* v. *Soros Associates International Inc.*, 328 F Supp 944, 947 (S.D.N.Y. 1971), the Court stated "Arbitration is a creature of contract (citing cases). The issues * * * is whether there was mutual assent to the Arbitration Agreement."[6]

(*footnote continued from preceding page*)

arbitration in the City of New York or in the City of London whichever place is specified in Part I of this charter pursuant to the laws relating to arbitration there in force, *before a board of three persons, consisting of one arbitrator to be appointed by the Owner, one by the Charterer, and one by the two so chosen.* The decision of any two of the three on any point or points shall be final. Either party hereto may call for such arbitration by service upon any officer of the other, wherever he may be found, of a written notice specifying the name and address of the arbitrator chosen by the first moving party and a brief description of the disputes or differences which such party desires to put to arbitration. If the other party shall not by notice served upon an officer of the first moving party within twenty days of the service of such first notice, appoint its arbitrator to arbitrate the dispute or differences specified, then the first moving party shall have the right without further notice to appoint a second arbitrator, who shall be a disinterested person with precisely the same force and effect as if said second arbitrator has been appointed by the other party. In the event that the two arbitrators fail to appoint a third arbitrator within twenty days of the appointment of the second arbitrator, either arbitrator may apply to a Judge of any court of maritime jurisdiction in the city abovementioned for the appointment of a third arbitrator, and the appointment of such arbitrator by such Judge on such application shall have precisely the same force and effect as if such arbitrator had been appointed by the two arbitrators." (Italics added)

[6] The Court of Appeals of the State of New York in *Astoria Medical Group* v. *Health Insurance*, 11 NY2d 128, 132, 227 NYS 2d 401, 182 NE2d 85 (1962), held, in part, as follows:

"Arbitration is essentially a creature of contract, a contract in which the parties themselves charter a private tribunal for the resolution of their disputes."

In *A/S Ganger Rolf* v. *Zeeland Transp. Ltd.*, 191 F. Supp 359, 363 (S.D.N.Y. 1961), where the Arbitration clause was self-executing in the event a party refused to name an arbitrator after receipt of a demand from the other party, the Court, in refusing to intervene under 9 U.S.C. § 4 held, in part, as follows:

> "Petitioners, while conceding that they have the right under the arbitration clause to proceed ex parte, urge that they have no duty to do so and that therefore they may waive the right and elect to petition the court for relief under the Arbitration Act. The petitioners overlook *the object of the Arbitration Act which contemplates only the enforcement of the arbitration agreement made by the parties themselves in the manner they themselves provide.* Petitioners, by waiving rights and remedies given to them by the arbitration clause cannot thereby acquire a new right not granted by the Act to have the court compel arbitration in a manner different from that provided by the clause. Having designed their own remedy for recalcitrance they cannot, over respondent's objection, ignore that remedy and pursue another." (Italics added)

In *Symphony Fabrics Corp.* v. *Bernson Silk Mills, Inc.*, 229 N.Y.S. 2d 200, 201 (1st Dept. 1962) aff'd, 12 NY 2d 409, 240 N.Y.S. 2d 23 (1963), which involved a consolidation of arbitrations, the Court held, in part, as follows:

> "We recognize that where jurisdiction is conferred by contract any party has the right to have his controversy tried by the forum he has contracted for, and he cannot be compelled to litigate before any other . . . (citing cases)

In *Stewart Tenants Corp.* v. *Diesel Construction Co.*, 229 N.Y.S. 2d 204, 206 (1st Dept. 1962), the Court in reversing an order consolidating two arbitrations, held, in part, as

follows:

> "As the foregoing implies, we regard the provision for consolidation as error. 'Arbitration is essentially a creature of contract' (Matter of Astoria Medical Group [Health Insurance Plan], 11 N.Y. 2d 128, 132, 227 N.Y.S. 2d 401, 403, 182 N.E. 2d 85, 87). When the contracting parties have agreed upon an arbitral forum, to impose another upon either of them without consent would be to rewrite their agreement (cf. Matter of Symphony Fabrics Corp., 16 A.D. 2d 473, 229 N.Y.S. 2d 200, decided herewith)."

As indicated in Point I hereof, the District Court did not have jurisdiction in view of the appeal pending before this Court, Appeal No. 75-7069, to issue its decision and order dated March 20, 1975. Moreover, based on the language of the arbitration agreement and the cases referred to herein, the Court was in error in ordering Nereus to arbitrate before a forum of five (5) arbitrators, four (4) of which would be selected by its opponents or their arbitrator appointees.

POINT V

(Appeal No. 7208)

The District Court erroneously removed the entire Nereus-Cepsa Arbitration Panel, which had been properly appointed.

The decision of the District Court dated December 18, 1974, in referring to the Nereus-Cepsa Arbitration Panel, correctly held that "Those two arbitrators then appointed a third arbitrator in accordance with the arbitration clause of the Contract." In the later action by Hideca against Nereus and nominally against Cepsa, the Court erroneously removed those arbitrators. By its decision dated March 21, 1975, which it ordered to be filed in the first action and

served on the arbitrators "appointed in the arbitration previously pending between defendants Nereus and Cepsa", the Court removed the three properly appointed arbitrators in the Nereus-Cepsa Arbitration which was then pending.

In *San Carlo Opera Co.* v. *Conley*, 72 F. Supp. 825, 833 (S.D.N.Y. 1946), aff'd 163 F 2d 310 (2d Cir. 1947), the Court held, in part, as follows:

> "The power of the courts, to set aside an award of a board of arbitrators, after bias or prejudice is shown, is well settled (citing authorities). But where the dispute has proceeded to arbitration, the court does not appear to have the power to order a substitution of arbitrators. In Williston, Contracts, 1923, it is observed: 'The American statutes contain no provision for vacating the office of arbitrator in the event he is shown to be biased or prejudiced during the proceeding.'
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> * * *
>
> It has been held that where there was an arbitration by consent of the parties, even though such arbitration be made a rule of the court, the court has no general power, without the consent of the parties, to make a substitution of arbitrators. Smith v. Warner, 14 Mich. 152. If the arbitrators have been appointed by the court, and the question of the disqualification of an arbitrator is raised before the arbitration has commenced, it appears the court has the power to modify or change its original order by effecting a change of arbiters for cause shown." (Citing cases)

In *Albatross Steamship Co.* v. *Manning Bros., Inc.*, 95 F Supp 459, 462 (S.D.N.Y. 1951), Judge Weinfeld held, in part, as follows:

> "Certainly there are no facts before the Court on which a finding could properly be made that Fitzsimmons is disqualified from acting for lack of impartiality. Even assuming that sufficient facts were

shown, the power of the Court to void his designation in advance of the hearing appears to be lacking. The respondent's remedy is set forth in Section 10 of the Arbitration Act. *San Carlo Opera Co.* v. *Conley, D.C.*, 72 F. Supp. 825, Affirmed 2 Cir., 163 F. 2d 310."[8]

There has been no allegation that any member of the Nereus-Cepsa Arbitration Panel* was biased or that the appointments of the arbitrators were not properly made in accordance with the provisions of the arbitration clause. Under such circumstances, the District Court would not have had power to remove the arbitrators, even if Cepsa had sought such relief.

Clearly the District Court in an action by Hideca for a preliminary injunction delaying the hearings of the Nereus-Cepsa Arbitration (75 Civil 463, Appeal No. 75-7206) and a petition under 9 USC § 5 for the appointment of a third arbitrator in the Nereus-Hideca Arbitration (75 Civil 464, Appeal No. 75-7207) did not have authority to remove the entire Nereus-Cepsa Arbitration Panel.

POINT VI

(Appeal Nos. 75-7206, 7207 and 7208)

The decision of the District Court dated March 21, 1975 is contrary to the provisions of the Federal Arbitration Act, 9 USC § 4.

There was no petition to compel arbitration before the District Court. On the contrary there was pending only i) Hideca's complaint for a preliminary injunction (75 Civil 463) and ii) a petition under 9 USC § 5 by Hideca

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[8] Other cases holding that the Courts cannot remove arbitrators in a pending arbitration are *Petition of Dover Steamship Co.*, 143 F Supp 738 (S.D.N.Y. 1956) and *Invotra N.V.* v. *Luria Bros. & Co.*, 1958 AMC 886 (S.D.N.Y. 1958).

* All of the arbitrators are members of the Society of Maritime Arbitrators and actively participate in arbitrations involving admiralty and maritime matters. The third arbitrator is the president of said Society.

(75 Civil 464) for the appointment of a third arbitrator in the Nereus-Hideca Arbitration. Despite the foregoing the Court decision and order dated March 21, 1975 directed Nereus to proceed to arbitration before five (5) arbitrators, with Cepsa, Hideca and Nereus each appointing one Arbitrator, and the three so appointed appointing the other two Arbitrators.

The only provision in the Federal Arbitration Act under which a Court may compel arbitration is Section 4, 9 USC § 4, which states, in part, as follows:

> "A party aggrieved by the alleged failure, neglect or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court . . . for an order directing that such arbitration proceed *in the manner provided for in such agreement* . . . The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, *the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement* . . ." (Italics added)

The arbitration clause of the Contract, under which Nereus and Hideca are required to arbitrate, and the same clause as incorporated in Addendum No. 2, under which Nereus and Cepsa are required to arbitrate, specified a panel of three (3) arbitrators. Since the Court's Order dated March 21, 1975 did not direct arbitration in accordance with the terms of the agreement, it is contrary to the express language of the statute.

Moreover, the law is clear that the courts do not intervene to order arbitration where the terms of the arbitration agreement between the parties does not require such intervention, as was the case with respect to the Arbitration Clause agreed to by the parties herein.

In *Kentucky River Mills* v. *Jackson,* 206 F. 2d 111, 118, 120 (6th Cir. 1953), cert. denied 346 U.S. 887, the Court held, in part, as follows:

> "An ex parte arbitration was permissible at common law where provided for by the terms of the arbitration agreement; and, as is evident upon its face, Section 4 of the Act uses permissive language only, and does not, by its terms, require resort to the enforcement provisions thereof, if an ex parte arbitration is permitted by the terms of the arbitration agreement.
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> * * *
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> "Moreover, the terms of Section 4 of the Act are permissive, not mandatory. [Citing cases] Our conclusion is that it was not necessary for Smith & Bird to resort to Section 4 of the Act before proceeding to arbitration in this case by the single arbitrator."

In *Standard Magnesium Corp.* v. *Fuchs,* 251 F 2d 455, 458 (10th Cir. 1957), the Court held, in part, as follows:

> "Section 4 of the Act provides a remedy by summary proceedings in the nature of specific performance where a court order is necessary in order for the arbitration to proceed. It does not follow, however, that § 4 must be resorted to in every case where one party refuses to proceed with the arbitration. It is permissive by its terms. If the agreement provides that where one party refuses or fails to submit to arbitration, then an arbitrator may be appointed and that the arbitration may proceed ex parte, and further provides for the procedure to be followed in such an ex parte proceeding, there is no occasion to invoke the remedy of § 4. Such a remedy is necessary only in those cases where one party refuses to participate in the arbitration and a court order is necessary in order for the arbitration to proceed ex parte. An example is where the arbitration agreement provides that each

party shall select an arbitrator and there is no provision in the agreement, where one party refuses to appoint an arbitrator, for the selection of such arbitrator. Moreover, § 4 only applies in those cases where one party is aggrieved by the failure, neglect or refusal of the other party to proceed with the arbitration. It is only where the arbitration may not proceed under the provisions of the contract without a court order that the other party is really aggrieved. This construction, we think, is in keeping with the spirit and purpose of the Act to make arbitration agreements irrevocable and to give the same effect to their provisions as are given to the provisions of contracts generally."

* * *

In *Texas Eastern Transmission Corp.* v. *Barnard,* 177 F.Supp. 123, 128 (E.D. Ky. 1959) the Court held, in part, as follows:

* * *

"It seems obvious that the plaintiff, Texas Eastern Transmission Corporation, being itself in default by its failure to appoint an arbitrator within thirty days demand therefor by defendants, is not a 'party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration' within the meaning of Title 9 U.S.C.A. § 4, supra. Moreover, the remedy afforded by this section is permissive (citing cases) and there is no occasion for application of the section where, as here, the agreements permit the arbitration to proceed ex parte.

In *A/S Ganger Rolf* v. *Zeeland Transp. Ltd.,* 191 F. Supp. 359, 363 (S.D.N.Y. 1961), the Court held, in part, as follows:

"An ex parte arbitration under the terms of an arbitration clause like the one in the case at bar is valid and

an award made thereunder is enforcible against a party bound by the clause. (Citing cases)

Petitioners, while conceding that they have the right under the arbitration clause to proceed ex parte, urge that they have no duty to do so and that therefore they may waive the right and elect to petition the court for relief under the Arbitration Act. The Petitioners overlook the object of the Arbitration Act which contemplates only the enforcement of the arbitration agreement made by the parties themselves, in the manner they themselves provide. Petitioners, by waiving rights and remedies given to them by the arbitration clause cannot thereby acquire a new right not granted by the Act to have the court compel arbitration in a manner different from that provided by the clause. Having designed their own remedy for recalcitrance they cannot, over respondent's objection, ignore that remedy and pursue another.

What petitioners really want here is a judgment declaring that Zeeland is bound by the arbitration clause in advance of arbitration as insurance against the possibility that they may be mistaken in their assertion that it is so bound. It does not seem to me that Sections 4, 5 and 6 of the Act contemplate such a declaratory judgment or authorize the court to render it. *These sections are designed only to insure that the parties proceed in the manner provided by the arbitration agreement which they themselves fashioned.*" (Italics added)

Arbitration is a creature of contract and it is clear from the express language of Section 4 of the Federal Arbitration Act, 9 USC § 4, and from the reported decisions that the District Court may only direct parties to proceed to arbitration "in the manner provided for" and "in accordance with the terms of" the arbitration agreement of the parties. Whatever power the courts have to consolidate

actions pending before them, they cannot in the name of consolidation disregard the express terms of the statute under which they have power to compel arbitration as the District Court has done by its decision dated March 21, 1975.

POINT VII

The Federal Arbitration Act, 9 USC § 1 *et seq.* does not authorize consolidation of arbitrations.

No decision by a United States Court of Appeals has ever held that a court acting under the Federal Arbitration Act and in particular Section 4 thereof, 9 USC § 4, has power to order different parties to submit their disputes to a single panel of arbitrators in a consolidated arbitration. There is no provision in the Act for consolidation of separate arbitrations and Section 4, as indicated above, requires the courts to order arbitration in the manner provided in the arbitration agreement. In addition, the court may act only when there is a finding that the party seeking such order is aggrieved by the "failure, neglect or refusal of another to arbitrate under a written agreement . . ."

Nereus never failed or refused to arbitrate either with Cepsa or with Hideca. In fact Nereus was prevented from going forward with the Nereus-Cepsa Arbitration in the manner provided in the arbitration agreement. Nereus has appointed an arbitrator in the Nereus-Hideca arbitration so that the very condition to the application of Section 4 of the Act does not exist with respect to Nereus.

Moreover, in those cases where a court has directed consolidation, the party which sought consolidation had agreed to waive its right to appoint an arbitrator so that the panel of arbitrators was the panel appointed by the other two parties.

In *Symphony Fabrics Corp.* v. *Bernson Silk Mills, Inc.*, 229 N.Y.S. 2d 200, 201 (1st Dept. 1962) aff'd, 12 NY 2d 409, 240 N.Y.S. 2d 23 (1963), which involved a consolidation of arbitrations, the Court held, in part, as follows:

> "Here we believe that any possible prejudice to Bernson, the party objecting to the consolidation, can be obviated by restricting the challenges of the other two parties. It appears that in the arbitration proceeding initiated by Bernson, both Bernson and Symphony have made their designations from the panel of proposed arbitrators submitted by the American Arbitration Association. If respondent Barbara Dance Frocks joins in the designations made by petitioner, such a restriction will be accomplished. If Barbara Dance Frocks so stipulates, the order will be reversed and the motion to consolidate the proceedings granted with costs. Failing the filing of such a stipulation within ten days of the date of the filing of this decision, the order will be affirmed without costs."

In *Vigo Steamship Corp.* v. *Marship Corp.*, 309 NYS 2d 165 (1970), reversing 299 NYS 2d 200 (1st Dept. 1969), which was cited in Judge Stewart's opinion, the party seeking consolidation waived its right to appoint an arbitrator. The Appellate Division at page 201 stated, in part, as follows:

> "The moving party herein is the Vigo Steamship Corporation, which had chartered a vessel, by name, the S. S. Nicolas Maris, from the owner, the Marship Corporation of Monrovia; this was a 'time charter'. Seven months later, Vigo, the charterer, in turn chartered the vessel to the Frederick Snare Corporation. * * * In order to resolve these differences by arbitration, as provided for by the separate charter arrangements, *Vigo has demanded that Snare name an arbitrator to act for both* and proceed to a joint arbitration with all three parties contemporaneously." (italics added)

In *Showa Shipping Co.* v. *A/B Bellis,* 1972 AMC 2458, 2459 (SDNY 1972), where the Court denied a motion for consolidation of two arbitrations, the Court stated, in part as follows:

> "[Petitioner] also stipulates in its petition and in its memorandum that it will withdraw its designated arbitrator and proceed to arbitration with the arbitrators designated by Bellis and Asiatic (i.e. the other two parties)."

Where consolidation has been granted it usually has involved disputes under two contracts where, the liability of the party to both contracts will be indemnified by the other party to either the primary or secondary contract. For example, where a Shipowner charters his vessel to a Charterer, who subcharters the vessel to a Subcharterer on an identical charter party form, a claim by the Subcharterer against the Charterer based on an unseaworthy condition of the vessel would result in an identical claim against the Shipowner by the Charterer. If the vessel were found to be unseaworthy the ultimate responsibility should fall to the Shipowner.

Accordingly if the Charterer, as the party to each contract waives the appointment of an arbitrator so that the entire dispute is determined by an arbitration panel consisting of two arbitrators appointed respectively by the Shipowner and the Subcharterer (together with a third arbitrator appointed by the two arbitrators so appointed), no violence is done to the Arbitration agreements. Under such circumstances, requiring a party to a contract to arbitrate his dispute with a stranger to his contract, albeit one ultimately liable, may possibly be condoned. But where Cepsa has no obligation to pay any arbitration award in favor of Nereus against Hideca, an order to consolidate in such case is an unconscionable intrusion upon the contract rights of Nereus and prejudicial to its position in arbitration.

Nor can consolidation be justified on the basis that there is evidence common to both arbitrations involving Hideca's default under the Contract. In the Nereus-Cepsa Arbitration, Nereus need only show the bills of lading for the carriage of cargo on Voyage 17, delivery of the cargo, and the admitted failure of Hideca to pay the freight (see page 3, *supra*). Thus in a matter of a few minutes of testimony documentary evidence can be introduced which will establish Hideca's "default in payment" of freight which gave Nereus the right to call upon Cepsa to perform the balance of the Contract.

In the case before this Court, unlike all of the other reported cases, the party which has arbitration agreements with each of the other two parties (i.e. Nereus), has not sought consolidation. Moreover, neither Cepsa nor Hideca has agreed to waive the appointment of an arbitrator and the District Court has ordered that they each appoint an arbitrator and that those two (together with an arbitrator to be appointed by Nereus) appoint two more arbitrators. The prejudice to Nereus is clear since of the panel of five arbitrators erroneously ordered by the Court, four will in effect have been appointed by Nereus' opponents, whose interests are common.

In *Chilean Nitrate* v. *Intermarine Co.*, 197[illegible] AMC 2460 (SDNY 1972), although not clear from the Court's opinion, the file indicates that the petitioner waived its right to appoint an arbitrator. In *Showa Shipping Co.* v. *Skibs A/S Agnes,* referred to in the District Court's opinion, (an unreported order of the Special Term of the New York State Supreme Court which directed arbitration before either 3 or 5 arbitrators without citing any authorities) the petitioner waived its right to appoint an arbitrator. The arbitration panel was set up by the other parties and consisted of 3 arbitrators.

In *Robinson* v. *Warner,* 370 F. Supp. 828 (D.C.R.I. 1974), cited by the District Court, no two parties were asserting

the same position and the arbitrators would be appointed by the American Arbitration Association. Moreover, the case was not one covered by the Federal Arbitration Act and therefore the question of the Court's power under the Act was not involved.

In the *Vigo* case, *supra,* the Court held at page 168 "that there are common issues of law and fact involved in the two disputes is clear * * * There is, therefore, a plain identity between the issues involved in the two controversies, i.e., the amount of damages incurred during Snares' (i.e., subcharterer's) voyages and the respective liability for them of Vigo (i.e., charterer) and Snare" (Parenthetical insertions added). There is no such identity of issues in the Nereus arbitrations with Cepsa and Hideca. For example, all issues concerning Nereus' claims for demurrage against Hideca are of no concern to Cepsa and the same is true of Hideca's alleged counterclaims based on the period of voyages Nos. 1 to 17.

The reference to federal law in the *Vigo* case is dicta and the Court stated in part, as follows:

> "It is clear, therefore, that the provisions of the CPLR are applicable to the present controversy and there is no basis upon which to predicate a holding that Federal law controls. Furthermore, even assuming the applicability of Federal law to the issue of consolidation, it is not at all clear that the Federal courts would be powerless to or would refuse to order consolidation were they faced with this factual situation."

Since the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* provides only for enforcement of the arbitration agreement made by the parties and does not contain statutory authority to consolidate separate arbitrations, it is erroneous to rely upon Rule 42(a) of the Federal Rules of Civil Procedure, which speaks of "actions involving a common question of law or fact [which] are pending before the Court" as a basis for consolidating arbitrations before arbitrators.

For a court to assume that the interest of a party to a consolidated arbitration will be protected in the same manner that the interest of a litigant in a consolidated trial may be protected is to fail to appreciate the difference between the arbitral process and a court trial. In a consolidated trial a learned judge can separate the issues of law and fact as they apply to the several parties and so instruct a jury, or rule accordingly. He can also set aside a verdict and his decision is appealable. An arbitration is not conducted under the rules of evidence and an arbitration award is final and may only be set aside for the limited statutory grounds contained in Section 10 of the Federal Arbitration Act, 9 U.S.C. § 10.

In view of the language of the Federal Arbitration Act and the cases referred to in Point VI herein, the District Court did not have power to order consolidation in this case. Moreover, in the cases where there was consolidation of arbitrations covered by the Federal Arbitration Act, no direct challenge based on the Act was made. The results were accomplished because the moving party accepted the arbitration panel appointed by the other two parties.

The result of the District Court's erroneous decision dated March 21, 1975 is both prejudicial to Nereus and is invalid under the Federal Arbitration Act.

CONCLUSION

The order of the District Court dated March 21, should be reversed and the decision of the District Court dated December 18, 1974 should be affirmed.

Respectfully submitted,

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RAYMOND J. BURKE, JR., *Of Counsel.*

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

COMPANIA ESPANOLA DE PETROLEOS,S.A,

Plaintiff-Appellant-Cross-Appellee,

against

NEREUS SHIPPING, S.A.,

Defendant-Appellee-Cross-Appellant.

HIDROCARBUROS y DERIVADOS, C.A.,

Plaintiff-Appellee,

against

NEREUS SHIPPING, S.A.,

Defendant-Appellant.

(And one other action)

State of New York,
County of New York,
City of New York—ss.:

IRVING LIGHTMAN , being duly sworn, deposes and says that he is over the age of 18 years. That on the 29th day of July , 1975, he served two copies of Brief of Nereus Shipping as Appellant on Baker & McKensie , the attorneys for Plaintiff-Appellee and Petitioner-Appellee by delivering to and leaving same with a proper person in charge of their office at 375 Park Avenue in the Borough of Manhattan , City of New York, between the usual business hours of said day.

Irving Lightman

Sworn to before me this
29th day of July , 1975.

Courtney J. Brown

COURTNEY J. BROWN
Notary Public, State of New York
No. 31-5472920
Qualified in New York County
Commission Expires March 30, 1976

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Plaintiff-Appellant-Cross-Appellee,

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Irving Lightman

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